62-SBE-094

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Hatter of the Appeal of)
)
KIMBERLY-CLARK CORPORATION)

Appearances:

For Appellant: Francis G. Stapleton and Jay Grant, Attorneys at Law

For Respondent: Burl D. Lack, Chief Counsel

O P I N I O N

This appeal is made pursuant to Section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Kimberly-Clark Corporation for a refund of $34,731.92, consisting of franchise taxes in the amount of $29,876.92 and interest thereon of $4,855, for the income and taxable year ended April 30, 1956.

This controversy had its inception when Respondent determined that the nature of Appellant's activities in California first subject it to the franchise tax in the year ended April 30, 1955, and mailed to Appellant a statement of the additional liability applicable to a commencing corporation as provided in Section 23224 of the Revenue and Taxation Code. That section applies when a corporation previously subject to the income tax provisions of the law becomes subject to the franchise tax provisions by changing the nature of its business in California from interstate to intrastate. The additional liability is designed to place the corporation on the prepayment basis that is required by Chapter 2 of the Bank and Corporation Tax Law (Sections 23101 to 23364a, inclusive, of the Revenue and Taxation Code).

Appellant paid the tax of $29,876.92 plus interest of $4,855 and thereafter filed with Respondent a claim for refund of the total amount. The claim is based on three contentions of error on the part of Respondent, one of which is substantive and the others procedural, as follows:

1. That Appellant became subject to the franchise tax by commencing an intrastate California business in 1950 rather than 1955.

2. That Respondent erred in failing to notify Appellant's attorney of the additional tax as requested by Appellant.

3. That Respondent erred in failing to mail to Appellant a formal Notice of Proposed Assessment.

At all of the times mentioned herein Appellant, a Delaware corporation, was engaged in the business of manufacturing and selling cellulose wadding and paper products and had its headquarters in Wisconsin.

From 1937 to 1950 Appellant was doing an exclusively interstate business in California and filed corporation income tax returns under Chapter 3 of the Bank and Corporation Tax Law.

On July 3, 1950, Appellant qualified to do business in California and for each year ended thereafter filed franchise tax returns under Chapter 2 of the Bank and Corporation Tax Law. It commenced filing franchise tax returns rather than income tax returns because it believed that increased California operations starting in 1950 changed the character of its activities from interstate to intrastate. Its California operations in that year were as follows:

1. A district sales office about 2000 square feet in size was held by Appellant in San Francisco under a lease. Appellant owned the furniture and equipment therein; its name was on the door and in the local telephone directory; and its local office staff consisted of the district sales manager, two or three salesmen, and an average of eleven office employees. In addition there were other salesmen operating in the field but the record does not indicate their number.

2. The San Francisco office had complete authority over California sales in that it directed all sales activity, accepted or rejected all orders, and completed all contracts.

3. All billings were made by and payments were made to Appellant's headquarters in Wisconsin. Deliveries to California purchasers were made directly to the customer from one of Appellant's out-of-state plants.

4. bales meetings were regularly held at the San Francisco office and that office maintained files of all district sales reports, expense accounts and orders, as well as stocks of sales aids such as samples, displays and other sales promotion material.

5. Appellant maintained a bank account in San Francisco which was drawn on by local personnel.

6. Although the district sales manager in San Francisco did not have final authority to select and remove personnel and wholesale accounts, his recommendations were almost always followed.

7. All contacts and adjustments with customers respecting such matters as damaged goods, customer complaints, claim adjustments, overcharges and shipment shortages were handled by the San Francisco office,

Luring the income year ended April 30, 1955, Appellant started the construction of a plant in Fullerton, California, from which it proposed to and in fact has made deliveries to California customers.

The sole substantive question before us is whether the activities of Appellant in California which started in 1950 amounted to "doing business" in California so as to make the franchise tax applicable, or were exclusively interstate activities reachable only through the income tax,

The franchise tax is imposed on general corporations "... doing business within the limits of this State . .." (Rev. & Tax. Code, § 231.51). "'Doing business? means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit" (Rev. & Tax. Code, § 23101). Regulation 23101 of Title 18, California Administrative Code, provides in part that

> A foreign corporation which maintains a stock of goods in the State and makes deliveries in this State pursuant to orders taken by employees or agents in this State is "doing business" and ... A foreign corporation engaged wholly in interstate commerce is not "doing business': ....

Although the regulation mentions only the factual situation of maintaining a stock of goods in California for delivery in California as amounting to "doing business" therein, Respondent does not appear to seriously contend that such is the only test. To the contrary, it is Respondent's general conclusion as stated in its brief that "The regulation makes it clear that the Franchise Tax Board construes the term 'doing business!, with respect to foreign corporations, to require some activity beyond the scope of taking orders followed by delivery of the merchandise from outside the State, ..." Furthermore, it is well established that only some and not necessarily all activity need be of an intrastate character. (Matson Navigation Co". v. State Board of Equalization, 297 U.S. 441 [80 L. Ed. 791].)

We do not believe that it is necessary for us to review herein all of the many cases in which questions similar to that at issue have been discussed and decisions reached. One of such cases which is factually analogous to the matter before us and which was affirmed by the United States Supreme Court is the case of Field Enterprises, Inc. v. Washington, 47 Wash. 2d 852 [289 P.2d 1010], aff'd, 352 U.S. 806 [1 L. Ed. 2d 39], wherein it was

held that the taxpayer's local activities were sufficiently extensive to amount to an intrastate business.

With the following; exceptions, the factual situation in the Field case was substantially identical to the activities of Appellant as already described herein:

1. All sales orders and contracts of Field required out-of-state approval.

2. The local office of Field collected deposits and prepayments but all other billings and collections were handled out-of-state.

3. It is not clear whether Field maintained a local bank account which could be drawn on by the local staff,

4. In the case of Field the local staff did not handle inquiries concerning 'return, replacement or repair of merchandise that had been sold and there is no indication that it handled any other adjustments for customers.

Appellant's intrastate operations during the year 1950 and thereafter were substantially more extensive than those in the Field case, particularly in that its California office approved and entered into all sales contracts and adjusted all complaints and other like customer matters. As a consequence it is our opinion that its intrastate activities started in 1950 and not in 1955 as contended by Respondent.

Having reached this conclusion, it is not necessary for us to consider the contentions of Appellant concerning procedural errors on the part of Respondent.

Appeal of Kimberly-Clark Corporation

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Kimberly-Clark Corporation for a refund of $34,731.92, consisting of franchise taxes in the amount of $29,876.92 and interest thereon of $4,855, for the income and taxable year ended April 30, 1956, be and the same is hereby reversed.

Lone at Sacramento, California, this 19th day of December,-- 1962, by the state Board of Equalization.

_____, Chairman

John W. Lynch, Member

Paul R. Leake, Member

Richard Nevins, Member

ATTEST: Dixwell L. Pierce, Secretary

* * * * * * *